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Nivethah a/p Thamayandiran & Anor v Ketua Pengarah Jabatan Pendaftaran Negara, Malaysia & Anor

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HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCvC-1345–08 OF 2022
CHOONG YEOW CHOY JC
11 JANUARY 2024

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Constitutional Law — Jurisdiction — Civil court — Determination of religious status — Plaintiffs born out of wedlock and deemed illegitimate — Whether plaintiffs Muslims by virtue of biological mother's lineage — Section 2(1)(d) of Administration of Religion of Islam (State of Selangor) Enactment 2003 — Applicability towards plaintiffs as illegitimate children — Whether 'parents' in s 2(1)(d) 'refers only to parents of legitimate children' — Whether plaintiffs could be deemed in law born as Muslims pursuant to s 2(1)(d) of Administration of the Religion of Islam (State of Selangor) Enactment 2003 — Whether present case an ab initio or renunciation case — Whether court had jurisdiction to hear and determine issue

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Words & Phrases — 'Nasab' — Ascription of paternity — Illegitimate children — Religion of father of children — Whether could be ascribed to illegitimate children — Islamic Family Law (State of Selangor) Enactment 2003 s 111

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The plaintiffs were biological sisters born out of wedlock and deemed illegitimate. Their biological parents were Thamayandiran and Anizah Genasan, both of Indian descent. The plaintiffs' maternal biological grandmother, one Safiah Othman, was Anizah Genasan's biological mother. Safiah Othman was a Muslim who had a relationship with one Ganesan AJ Karuppiah, a Hindu. As a result of that relationship, the plaintiff's biological mother, that was, Anizah Genasan was also born out of wedlock and deemed an illegitimate child. In the present case, the plaintiffs sought two broad categories of relief vide encl 1. The first type of relief were declarations that: (a) the plaintiffs' religion was, and had always been, Hindu; and (b) that all laws made by the Selangor State Legislative Assembly under the Ninth Schedule, List II, item 1 of the Federal Constitution, including the Administration of the Religion of Islam (State of Selangor) Enactment 2003 did not apply to or affect the plaintiffs. The second type of relief, in the event that the court granted the first type of relief, were declarations/orders that: (i) the plaintiffs were entitled to be issued identity cards by the first defendant in recognition of their religion; and (ii) an order in the nature of mandamus directing the first defendant to issue identity cards to the plaintiffs which reflect the declarations made under

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the first category of reliefs sought. In support of their declarations sought, the plaintiffs argued that the present case was not a matter of renunciation, and hence the present court had jurisdiction to hear the case. On the contrary, it was contended by the defendants that the plaintiffs were born Muslims by virtue of their biological mother's lineage. Further, the defendants argued that that a reading of s 111 of the Islamic Family Law (State of Selangor) Enactment 2003 pointed to the conclusion that the nasab of the plaintiffs could not be established in their father unless they were born legitimate. Since the plaintiffs in the present case were born illegitimate, when s 111 of the Islamic Family Law (State of Selangor) Enactment 2003 read together with s 2(1)(d) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, the words 'parents' in the latter provision 'cannot refer to father and can only refer to mother because the putative father of an illegitimate child cannot, in law, be considered as the child's father'. The issue that arose for determination were: (A) whether the court was seized with the jurisdiction to determine the religion of the plaintiffs; if yes (B) whether the plaintiffs were born into the Muslim faith; and (C) whether the present case was an ab initio or a renunciation case.

Held, allowing the plaintiff's application vide encl 1 with costs:

(1) In cases where a person's religious status of whether she or he is a Muslim or not was in dispute, on the authority of the decision of the Federal Court in *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 ('Rosliza'), the court had the exclusive jurisdiction to hear and determine the said issue. The passages relied by the second defendant from the case of *Rosliza*, did not answer the critical question of whether the present case was an ab initio or a renunciation case. This question of law which required a determination of whether the plaintiffs were or were not Muslims was for the court to hear and decide. Hence, the question of whether the court was seized with the jurisdiction to determine the religion of the plaintiffs, was answered in the affirmative (see paras 11, 17 & 24).

(2) As was rightly underscored by the Federal Court in *Rosliza*, the determination of whether a person was or was not a Muslim under the law required the civil courts to evaluate the factual matrix and circumstances presented before it. The Federal Court in *Rosliza*, did say that 'parents', in s 2(1)(d) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, 'refers only to the parents of legitimate children'. As the plaintiffs in this case were illegitimate children, that section had no application, and the plaintiffs could not be deemed in law as having been born as Muslims pursuant to s 2(1)(d) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. In the circumstances, the plaintiffs had made out their

A claim on a balance of probabilities and were entitled to the reliefs sought in encl 1 (see paras 25, 37, & 46)

[Bahasa Malaysia summary

B Plaintif adalah adik beradik kandung yang dilahirkan luar nikah dan dianggap tidak sah taraf. Ibu bapa kandung mereka ialah Thamayandiran dan Anizah Genasan, kedua-duanya berketurunan India. Nenek kandung belah ibu plaintif, seorang Safiah Othman, adalah ibu kandung Anizah Genasan. Safiah Othman adalah seorang Muslim yang mempunyai hubungan dengan seorang Ganesan AJ Karuppiah, seorang Hindu. Hasil daripada hubungan itu, ibu
C kandung plaintif, iaitu Anizah Genasan juga dilahirkan luar nikah dan disifatkan sebagai anak tidak sah taraf. Dalam kes semasa, plaintif memohon dua kategori luas relif melalui lampiran 1. Jenis relif pertama ialah deklarasi bahawa: (a) agama plaintif adalah, dan sentiasa, Hindu; dan (b) bahawa semua undang-undang yang dibuat oleh Dewan Undangan Negeri Selangor di bawah
D Jadual Kesembilan, Senarai II, Butiran 1 Perlembagaan Persekutuan, termasuk Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 tidak terpakaik kepada atau menjejaskan pihak plaintif. Jenis relif kedua, sekiranya mahkamah memberikan relif pertama, adalah deklarasi/perintah bahawa: (i) plaintif berhak untuk diberikan kad pengenalan oleh defendan pertama sebagai
E mengiktiraf agama mereka; dan (ii) perintah berbentuk mandamus mengarahkan defendan pertama mengeluarkan kad pengenalan kepada plaintif yang menggambarkan deklarasi yang dibuat di bawah kategori pertama relif yang diminta. Dalam menyokong deklarasi mereka yang dipohon, plaintif berhujah bahawa kes semasa bukan soal penolakan, dan oleh itu mahkamah
F sekarang mempunyai bidang kuasa untuk mendengar kes itu. Sebaliknya, defendan berpendapat bahawa plaintif dilahirkan beragama Islam berdasarkan keturunan ibu kandung mereka. Selanjutnya, defendan berhujah bahawa bacaan s 111 Enakmen Undang-undang Keluarga Islam (Negeri Selangor) 2003 menunjukkan kesimpulan bahawa nasab plaintif tidak boleh
G diwujudkan dalam bapa mereka melainkan mereka dilahirkan secara sah. Oleh kerana plaintif dalam kes ini dilahirkan sebagai tidak sah, apabila s 111 Enakmen Undang-Undang Keluarga Islam (Negeri Selangor) 2003 dibaca bersama s 2(1)(d) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003, perkataan 'ibu bapa' dalam peruntukan terakhir 'tidak boleh merujuk kepada
H bapa dan hanya boleh merujuk kepada ibu kerana bapa yang disangkakan kepada anak tidak sah taraf tidak boleh, dalam undang-undang, dianggap sebagai bapa kanak-kanak itu'. Isu yang timbul untuk penentuan adalah: (A) sama ada mahkamah telah dihalang dengan bidang kuasa untuk menentukan agama plaintif; jika ya (B) sama ada plaintif dilahirkan dalam
I agama Islam; dan (C) sama ada kes semasa ialah kes ab initio atau kes penolakan.

Diputuskan, membenarkan permohonan plaintif melalui lampiran 1 dengan kos:

(1) Dalam kes di mana status agama seseorang sama ada dia beragama Islam atau tidak dipertikaikan, atas kuasa keputusan Mahkamah Persekutuan dalam *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 ('Rosliza'), pihak mahkamah mempunyai bidang kuasa eksklusif untuk mendengar dan menentukan isu tersebut. Petikan yang digunakan oleh defendan kedua daripada kes *Rosliza*, tidak menjawab soalan kritikal sama ada kes ini adalah ab initio atau kes penolakan. Persoalan undang-undang ini yang memerlukan penentuan sama ada plaintif beragama Islam atau bukan adalah untuk mahkamah mendengar dan memutuskannya. Oleh itu, persoalan sama ada mahkamah telah dihalang dengan bidang kuasa untuk menentukan agama plaintif, telah dijawab secara afirmatif (lihat perenggan 11, 17 & 24).

(2) Seperti yang ditegaskan oleh Mahkamah Persekutuan dalam *Rosliza*, penentuan sama ada seseorang itu beragama Islam atau bukan di bawah undang-undang memerlukan mahkamah sivil menilai matriks fakta dan keadaan yang dikemukakan di hadapannya. Mahkamah Persekutuan dalam *Rosliza*, memang mengatakan 'ibu bapa', dalam s 2(1)(d) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003, 'hanya merujuk kepada ibu bapa anak yang sah taraf'. Oleh kerana plaintif dalam kes ini adalah anak tidak sah taraf, seksyen itu tidak terpakai, dan plaintif tidak boleh disifatkan dalam undang-undang sebagai telah dilahirkan sebagai orang Islam menurut s 2(1)(d) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003. Dalam keadaan tersebut, plaintif telah membuat tuntutan mereka atas imbangan kebarangkalian dan berhak mendapat relif yang diminta dalam lampiran 1 (lihat perenggan 25, 37, & 46).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865; [2010] 1 MLRA 524, FC (refd)

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441; [2007] 4 AMR 472; [2007] CLJU 714; [2007] 6 MLRH 730, HC (refd)

Datuk Syed Kecik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101, FC (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain [2007] 4 MLJ 585; [2007] 3 AMR 693; [2007] 3 CLJ 557; [2007] 1 MLRA 359, FC (distd)

Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181; [2021] 2 AMR 551; [2021] 3 CLJ 301; [2021] 2 MLRA 70, FC (folld)

YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24, FC (refd)

Legislation referred to

Administration of the Religion of Islam (State of Selangor) Enactment 2003 ss 2(1), 2(1)(b), 2(1)(d), 61(3)(b)(x), 74(2)
Federal Constitution art 121(1), (1A), Ninth Schedule, List II, item 1
Islamic Family Law (State of Selangor) Enactment 2003 s 111
Rules of Court 2012 O 53
Specific Relief Act 1950 s 41

Gurdial Singh Nijar (with Abraham Au and Lim Sze Han) (Yeoh Mazlina & Partners) for the plaintiffs.
Mohammad Sallehuddin bin Md Ali (Attorney General's Chambers) for the first defendant.
Kamaruzaman bin Muhammad Arif (with Muhammad Izzat bin Dzulkafli) (Kamaruzaman Arif & Sofiah) for the second defendant.

Choong Yeow Choy JC:

INTRODUCTION

[1] The matter before this court concerns the religion of the plaintiffs.

[2] The plaintiffs, Nivethah a/p Thamayandiran and Swetha a/p Thamayandiran, seek two broad categories of reliefs. The second set of reliefs are consequential to the granting of the reliefs sought under the first broad category.

[3] The first are declarations that are general in nature, namely: (a) that the plaintiffs' religion is, and has always been, Hindu; and (b) that all laws made by the Selangor State Legislative Assembly under the Ninth Schedule, List II, item 1 of the Federal Constitution, including the Administration of the Religion of Islam (State of Selangor) Enactment 2003 do not apply to or affect the plaintiffs.

[4] The second type of reliefs sought by the plaintiffs are targeted primarily at the first defendant, the Ketua Pengarah, Jabatan Pendaftaran Negara. In the event that this court grants the first type of reliefs sought by the plaintiffs, they seek the following declaration/order, namely: (a) that the plaintiffs are entitled to be issued identity cards by the defendant in recognition of their religion; and (b) an order in the nature of mandamus directing the defendant to issue identity cards to the plaintiffs which reflect the declarations made under the first category of reliefs sought.

[5] The second defendant in this action is the Majlis Agama Islam Selangor ('MAIS').

OVERRIDING ISSUES

[6] The principal issue for consideration is whether this court is seized with the jurisdiction to determine the religion of the plaintiffs.

[7] If the answer to the above key issue is in the affirmative, the corresponding issue is whether the plaintiffs were born into the Muslim faith. In resolving this equally crucial issue, questions arise as to the applicable law for determining the religion of a citizen in this country.

[8] If the answer to the question outlined in the preceding para [7] is in the negative, the issue of renunciation of the Muslim faith does not arise.

THE JURISDICTION ISSUE

[9] At the outset, it should be emphasised that this court, being a civil court, will not have jurisdiction and accordingly cannot exercise jurisdiction over this matter if this matter were one that involves the renunciation of the Muslim faith. Cases involving the renunciation of the Muslim faith are within the exclusively jurisdiction of the Syariah Court. Article 121(1A) of the Federal Constitution expressly provides that the High Court in Malaya referred to in art 121(1) 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts'.

[10] In addition, this court takes cognisance of the provisions in ss 61(3)(b)(x) and 74(2) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 which expressly confer jurisdiction on the Syariah Court in Selangor to hear cases relating to the renunciation of the Muslim faith.

[11] However, in cases where a person's religious status of whether she or he is a Muslim or not is in dispute, on the authority of the decision of the Federal Court in *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181; [2021] 2 AMR 551; [2021] 3 CLJ 301; [2021] 2 MLRA 70 ('Rosliza bt Ibrahim'), this court has the exclusive jurisdiction to hear and determine the said issue. As articulately clarified by the Federal Court:

> [78] ... Syariah Courts may only exercise jurisdiction over a person or persons on two conditions. Firstly, the person shall profess the religion of Islam. This can generally be classified as jurisdiction *ratione personae* — where the jurisdiction of the tribunal or court is contingent on the litigant's legal persona. The phrase is most commonly used in disputes where one party is a sovereign, a foreign State, or one who enjoys diplomatic immunity and privileges cloaking him with immunity from legal process.
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> [79] Secondly, even if Syariah Courts may exercise jurisdiction *ratione personae*, they

must still ensure that they have jurisdiction over the subject-matter as expressly enumerated in the said item 1. This may be classified as jurisdiction *ratione materiae* — or subject matter jurisdiction.

[80] Unlike the superior courts in Part IX of the FC which are constitutionally established and in whom the judicial power of the Federation inherently vests, the Syariah Courts are creatures of statute (specifically State Enactments) and accordingly, their jurisdiction is strictly circumscribed by the laws which establish them. Absent jurisdictions *ratione personae* and *ratione materiae* over a person, Syariah Courts are not empowered by the FC to exercise any power over that person and if exercised, would be ultra vires the FC.

...

[108] ... if a matter concerns an ab initio case, that is, the question whether a person is in the first place a 'person professing the religion of Islam' it necessarily concerns a question regarding one's identity under the FC which in turn necessitates constitutional interpretation. This is because the phrase 'persons professing the religion of Islam' is a constitutional term. Accordingly, the civil courts are empowered, indeed, duty-bound to adjudicate the matter. It is only in renunciation cases where one already professes or proclaims to profess the religion of Islam (irrespective of whether they actually practise the faith) with the subsequent decision to change what they profess, that the matter is removed to the jurisdiction of the Syariah Court.

[12] In light of the above authorities, the pivotal question before this court is whether the present matter concerns the question of whether the plaintiffs' religious status is or is not in dispute.

AB INITIO OR RENUNCIATION CASE?

[13] The plaintiffs, Nivethah a/p Thamayandiran and Swetha a/p Thamayandiran, are biological sisters and born in 2003 and 2004 respectively. They seek the declarations in encl 1 as they have maintained the position that their religion is, and has always been, Hindu. Hence, they disagree that this is a renunciation case.

[14] The first defendant, the Ketua Pengarah, Jabatan Pendaftaran Negara, has adopted the proposition that the plaintiffs are Muslims by s 2(1)(b) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. Hence, by virtue of art 121(1A) of the Federal Constitution, the first defendant argued that this court 'has no jurisdiction to grant the declaration that the plaintiffs are no longer Muslims'.

[15] The second defendant, the Majlis Agama Islam Selangor, on the other hand, argued that to all intents and purposes, 'the plaintiffs' action tantamount to an action for renunciation from the religion of Islam and not for a declaration that the plaintiffs are not Muslim ab initio'.

[16] In their submissions, the second defendant relied on the following passages from the decision of the Federal Court in *Rosliza bt Ibrahim*:

> [89] The High Court and the Court of Appeal are therefore correct in principle. If the plaintiff is a Muslim seeking to renounce her faith in Islam, then the matter being 'an offence against the precepts' of Islam, is within the jurisdiction of the Syariah Court due to art 121(1A) of the FC. The Court of Appeal further confirmed this by following this court's decision in *Lina Joy* ...
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> [90] At this juncture, a very fundamental distinction identified earlier, emerges. There is a critical distinction between 'no longer a Muslim' on the one side, and 'never was a Muslim', on the other. The former refers to renunciation cases which as explained, fall within the jurisdiction of the Syariah Courts. The latter, which may be loosely described as ab initio cases, cannot, on a coherent application of the law, fall within the jurisdiction of the Syariah Courts ...
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> ...
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> [99] Reverting to the question: do the civil courts possess jurisdiction to determine the status of persons who claim to 'never have been Muslim' as opposed to 'no longer being a Muslim'? The answer to the question must naturally be in the affirmative as otherwise there would be no legal recourse for persons of the ab initio category. When it concerns a renunciation case, the civil courts have consistently held that it was within the jurisdiction of the Syariah Courts conferred under art 121(1A) of the FC. For the record, learned Senior Federal Counsel appearing for the Attorney General as amicus curiae, agreed that it is the civil courts that have jurisdiction over persons of the 'ab initio category'.

[17] These passages relied by the second defendant merely establish what this court has set out at the very beginning in paras [9] and [10] above. These passages cited by the second defendant do not answer the critical question of whether the present case is an ab initio or a renunciation case. The answer to this vital question determines whether this court has jurisdiction to grant the declarations sought by the plaintiffs.

[18] Reverting to para [89] of the Federal Court decision in *Rosliza bt Ibrahim* that was quoted by the second defendant, the Federal Court had also said as follows:

> [89] ... However, the conclusion of the courts below that the plaintiff is a Muslim was based solely on the erroneous finding of fact that the plaintiff's parents were married during her birth and thus resulting in the erroneous application of s 2(1)(b) of the ARIE 2003. Premised on the earlier findings that the plaintiff is an illegitimate child, the conclusion formed on the said s 2(1)(b) is unsustainable.

[19] In other words, a determination will first have to be made as to whether the plaintiff in *Rosliza bt Ibrahim* was a Muslim by virtue of s 2(1)(b) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003. The same applies to the present case.

[20] On the references to *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 3 AMR 693; [2007] 3 CLJ 557; [2007] 1 MLRA 359 ('Lina Joy'), the important qualifications that were made in those passages must be underscored. At para [89] in *Rosliza bt Ibrahim*, Tengku Maimun CJ did say that:

> [89] ... To understand this, it would perhaps be useful to distinguish *Lina Joy*.

[21] And again, at para [90], the learned Chief Justice made the following critical observations.

> [90] *Lina Joy* involved a case where a self-admitted Malay Muslim woman filed a suit to remove the word Islam from her identity card ... the ratio of *Lina Joy* appears to be that because Azlina was always a Muslim, it was necessary that any attempt by her to change her religion required the approval of the Syariah Court. In this context, *Lina Joy* is entirely distinguishable from the present case on the basis that the present case is an ab initio case and not a renunciation case.

[22] As a final remark on *Lina Joy* and to resolve the first of the two principal issues raised in this present matter, the following observations by Azahar Mohamed CJ (Malaya) are most pertinent.

> [142] It can be seen that the appellant's case rests on her never having been a Muslim. According to the appellant, she has never been a Muslim in all her life. What's more, according to the appellant she was born out of wedlock, raised by a Buddhist mother in the Buddhist faith at all times. She did not dispute that her putative father was at all material times a Muslim. In this regard, I agree with the findings of the learned Chief Justice that as the evidence stands, the appellant ought to have succeeded in her claim in the courts below ie, that her parents being unmarried at the time of her birth renders her an illegitimate child. I also agree with the learned Chief Justice's findings that the evidence suggests the appellant was raised in the Buddhist faith and there is nothing in the evidence to prove that the appellant was raised a Muslim. The appellant also averred that Muslim laws are being and will be imposed on her unlawfully. She further averred that there's no legal basis for imposing Islamic law and Islamic morality on her.
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> [143] In my opinion, both the courts below erred in failing to appreciate that the appellant is not claiming that she is 'no longer a Muslim'. *One crucial point needs to be made here. The present case is not a case of renunciation. It is not an 'exit case'. We are concerned here with the question of whether the appellant was a Muslim at birth, which is a question of law. The courts below made an erroneous finding that the present case fell outside the civil courts' jurisdiction.*
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> [144] Clearly, the decision of *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 3 CLJ 557 ('Lina Joy'), that was relied on by the Court of Appeal is distinguishable. Lina Joy and the present case could not be more different from each other. The issue in *Lina Joy* concerned the original de facto status of the applicant, a Malay who was originally a Muslim, seeking to renounce her Islamic faith. Therefore, the Federal Court found that it was a matter within the Syariah Court's jurisdiction. In my opinion, *where the subject matter requires a*

determination of whether a person is or is not a Muslim under the law, the civil High Court has the jurisdiction to hear and decide whether the case is properly brought before the civil courts by evaluating the factual matrix and circumstances presented before it and also the declaration that is being sought for. (Emphasis added.)

[23] What can be distilled from *Rosliza bt Ibrahim*, a decision by the apex court with a coram of nine judges are, inter alia, that *Lina Joy* is distinguishable from the present case and the present case, like *Rosliza bt Ibrahim*, concerns a question of law.

[24] This question of law which requires a determination of whether the plaintiffs are or are not Muslims is for this court to hear and decide. The answer to the first of the two predominant issues outlined in para [6] above is in the affirmative.

DETERMINATION OF THE RELIGIOUS FAITH

[25] As was rightly underscored by the Federal Court in *Rosliza bt Ibrahim*, the determination of whether a person is or is not a Muslim under the law requires the civil courts to evaluate the factual matrix and circumstances presented before it.

THE LAW

[26] Before delving into the factual matrix of the case, it is essential that the applicable law be examined in detail. Central to the present case is the Administration of the Religion of Islam (State of Selangor) Enactment 2003, in particular, s 2(1) of the said Enactment. The relevant section reads as follows:

2(1) In this Enactment, unless the context otherwise requires —

...

'Muslim' means —

(a) a person who professes the religion of Islam;

(b) a person either or both of whose parents were at the time of the person's birth, a Muslim;

(c) a person whose upbringing was conducted on the basis that he was a Muslim;

(d) a person who is commonly reputed to be a Muslim;

(e) a person who has converted to the religion of Islam in accordance with section 108; or

(f) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be oral or written;

[27] Of relevance is s 2(1)(b) of the said Enactment. Both the first and the second defendants submitted that the plaintiffs here fall squarely within the definition of 'Muslim' pursuant to s 2(1)(b) of the said Enactment.

[28] The defendants further relied on s 111 of the Islamic Family Law (State of Selangor) Enactment 2003. This section provides as follows:

> 111 Where a child is born to a woman who is married to a man more than six qamariah months from the date of the marriage or within four qamariah years after dissolution of the marriage either by the death of the man or by divorce, and the woman not having remarried, the nasab or paternity of the child is established in the man, but the man may, by way of li'an or imprecation, disavow or disclaim the child before the court.

THE FACTUAL MATRIX

[29] The following facts are not disputed. First, the plaintiffs were born out of wedlock and are hence illegitimate children.

[30] Their biological parents are Thamayandiran a/l N Kanniaseelan and Anizah a/p Genasan, both of Indian descent.

[31] The plaintiffs' maternal biological grandmother, one Safiah bt Othman, is Anizah a/p Genasan's biological mother. Safiah bt Othman is a Muslim.

[32] Safiah bt Othman had a relationship with one Ganesan a/l AJ Karuppiah, a Hindu. As a result of that relationship, the plaintiff's biological mother, that is, Anizah a/p Genasan was born out of wedlock and deemed an illegitimate child.

THE PARTIES' CONTENTIONS

[33] As a consequence of the above factual matrix, it was contended by the defendants that the plaintiffs were born Muslims by virtue of their biological mother's lineage. The defendants argued that that a reading of s 111 of the Islamic Family Law (State of Selangor) Enactment 2003 points to the conclusion that the *nasab* of the children (plaintiffs) in this case cannot be established in their father unless they were born legitimate. Since the plaintiffs in the present case were born illegitimate, when s 111 of the Islamic Family Law (State of Selangor) Enactment 2003 is read together with s 2(1)(d) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, the words 'parents' in the latter provision 'cannot refer to father and can only refer to mother because the putative father of an illegitimate child cannot, in law, be considered as the child's father.

[34] The defendants draw support for the above contentions from the following passages of the Federal Court's decision in *Rosliza bt Ibrahim*.

> [64] Under s 111, which relates to the ascription of paternity, a child may only be ascribed the paternity of the father if he or she is born to a woman who is married to the man for a period of more than six qamariah months. And the father may only disavow or disclaim paternity under the provisions of that section. It follows that a child born less than six qamariah months or born to a woman not married to the man who fathered the child is illegitimate and the nasab or paternity of the child could not be established in the father. A simple application of the section to the facts of the instant case results in the conclusion that the plaintiff is an illegitimate child and while her status as a Muslim is disputed, it remains undisputed that Ibrahim is a Muslim. And as a Muslim, the said s 111 applies to Ibrahim to remove him, in law, of any ascription of paternity to the plaintiff.
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> [65] The necessary implication upon a holistic construction of IFLE 2003 against s 2 of the ARIE 2003 therefore suggests that 'parents', in s 2 of the ARIE 2003, refers only to the parents of legitimate children. Reason being, if s 111 of the IFLE 2003 not only renders a child illegitimate but also bars the ascription of paternity to the said child, then it stands to reason that the putative father cannot, in law, be considered the child's father. This is the first reason why the plaintiff cannot be considered a Muslim simply by virtue of s 2(1)(b) of the ARIE 2003.

[35] In *Rosliza bt Ibrahim*, the Federal Court was confronted with the specific question of whether the plaintiff in that case could be ascribed the paternity of the father, who was a Muslim, and the Federal Court answered the question in the negative, the underlying basis being that the plaintiff was an illegitimate child.

[36] In the present case, as the plaintiffs are also illegitimate children, the defendants relied on *Rosliza bt Ibrahim* for the proposition that they cannot be ascribed the paternity of their father, who is a Hindu. This leave their mother, who the defendants assert, is a Muslim. And by virtue of s 2(1)(d) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, since 'either' of their parents, that is, their biological mother, was at the time of their birth, a Muslim, the plaintiffs are deemed as Muslims by law.

[37] The above is indeed a forceful and valid argument. Be that as it may, the Federal Court in *Rosliza bt Ibrahim*, did in the very para [65] relied by the defendants say that 'parents', in s 2(1)(d) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, 'refers only to the parents of legitimate children'. As the plaintiffs in this case are illegitimate children, that section has no application and the plaintiffs cannot be deemed in law as having been born as Muslims pursuant to s 2(1)(d) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

[38] The Federal Court in *Rosliza bt Ibrahim* further emphasised this point

at para [70] when it held as follows:

> [70] In conclusion, the following issues in respect of question 2 are clear. Firstly, the plaintiff is an illegitimate child. There is no proof of marriage of her parents at the time she was born. The plaintiff cannot be deemed a Muslim simply by virtue of s 2(1)(b) of the ARIE 2003 on the premise that 'either' or 'both' of her parents are Muslim.

[39] In this regard, this court is still tasked to make a determination as to the religion of the plaintiffs. Before proceeding to this aspect of the case, this court would like to address one preliminary objection raised by the second defendant. The second defendant has submitted that the plaintiff should have commenced their action by judicial review pursuant to O 53 of the Rules of Court 2012.

[40] The second defendant based their argument on the ground that first, 'the [sic] relieve sought by the plaintiffs are of prerogative relief involving the [sic] decision making process by a public authority (JPN) under the realm of public law and not private law'. Second, it argued that the present matter involved the challenging of a decision-making process by a public body made under public law.

[41] The authorities cited by the second defendant in support of their preliminary objection are *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441; [2007] 4 AMR 472; [2007] CLJU 714; [2007] 6 MLRH 730 and *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865; [2010] 1 MLRA 524.

[42] In response, the plaintiffs referred this court to *Datuk Syed Kecik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 at pp 103 and 107–108 and *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 for the proposition that relief by way of declaration pursuant to s 41 of the Specific Relief Act 1950 is permissible.

[43] Upon an examination of the authorities cited by the parties, this court is of the considered view that the plaintiffs are entitled to commence this action by way of an originating summons application.

[44] Returning to the issue of the religion of the plaintiffs, this court agrees with the submission of the plaintiffs that the approach to be adopted is as set out by the Federal Court in *Rosliza bt Ibrahim*'s case, that is, through a careful scrutiny of the factual evidence and the circumstances of the case.

[45] Based on the evidence before this court, it is of the considered view that the plaintiffs have made out their claim on a balance of probabilities.

[46] The plaintiffs are entitled to the reliefs sought in encl 1.

[47] The defendants are to each pay costs of RM10,000 to the plaintiffs.

Application allowed.

Reported by K Selvaraju